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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 400

FIFTH AND WALNUT, INCORPORATED and ALBERT J. HOFFMAN,

Petitioners,

against

LOEW'S INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, and UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 12, 1949.

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OPINIONS BELOW

There was no opinion by the District Court, the trial being to a jury. The opinion by the United States Court of Appeals for the Second Circuit is reported in 176 F. (2d) 587.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. The primary question presented by this petition is whether the trial court erred in refusing to admit into evidence and have read to the jury the Amended Complaint, certain Findings of Fact and Conclusions of Law of the District Court, the Opinion of the Supreme Court of the United States, the Mandate of the Supreme Court, and the Order of the District Court on the Mandate in *United States* v. *Paramount Pictures, Inc., et al.*,[1] a case then depending on remand from this Court in the District Court of the United States for the Southern District of New York, except as to United Artists Theatre Circuit, Inc., and Marcus Loew Booking Agency, Inc., neither of which is a defendant in that action. The decree in that case was *not* offered.

2. The second question presented is whether the trial court erred in refusing to grant six of petitioners' requests to charge relating to the Brown theatre and whether it erred in charging the jury that:

> "Each distributor had a right acting independently and not in concert, or pursuant to any combination or conspiracy in violation of the anti-trust laws, to license a move-over run to the operator of the Brown Theatre."

STATUTES INVOLVED

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, and the Act of October 15, 1914, 38 Stat. 730, commonly

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[1]The opinion of the District Court is reported in 66 F. Supp. 323. The Findings of Fact, Conclusions of Law and the Decree are reported in 70 F. Supp. 53. On appeal, the Decree of the District Court was affirmed in part and reversed in part, 334 U. S. 131.

referred to as the Sherman and Clayton Acts. Pertinent provisions of those acts are printed as an Appendix to this brief.

STATEMENT

Petitioners' statement of the case is incomplete and misleading. Judge Clark, speaking for the Court of Appeals, summarized the trial in the following language (176 F. (2d) 587, 594):

> "We conclude that the trial was fair and the result, while not a necessary one, was nevertheless quite within the evidence. The plaintiffs offered evidence justifying inferences of joint action among the defendants, but the defendants offered vigorous controverting evidence as well as testimony to indicate that the troubles of plaintiffs' theatre were due more to its location, condition, and quality of patronage than to their acts. The plaintiffs had chosen to submit their case to a distant tribunal where jurors could be as little influenced by matters of local prejudice as would be possible anywhere. Having so chosen and received a full and proper trial, they must abide by the result."

Plaintiffs below were from sometime in 1943 to the date of the filing of the complaint the owner and operator of the National theatre in Louisville, Kentucky. The complaint, in 53 paragraphs, alleged a conspiracy between the defendants and the operators of certain *first run* theatres in Louisville to license pictures *first run* only to those certain theatres and *not* to license pictures first run to plaintiffs' National theatre.[2] Plaintiffs'

[2]The so-called co-conspirators not named as defendants, because not amenable to process in the Southern District of New York (Pet. brief, p. 3), are Fourth Avenue Amusement Company, Broadway & Fourth Avenue Realty Company and Louisville Operating Co., Inc. Each is a Kentucky corporation and is amenable to process in the Western District of Kentucky, where plaintiffs' alleged cause of action arose.

counsel agreed with the court below that that was the plaintiffs' claim (R. 907a-908a).[3] The case was tried on that theory for 27 days before District Judge Vincent L. Leibell and a jury. The jury returned a verdict for the defendants. The trial court denied plaintiffs' motion to set aside the verdict (R. 686-691).

The petitioner Hoffman, a real estate speculator and contractor from Evansville, Indiana, purchased the National theatre at a distress sale for $80,000, making a down payment of $20,000, balance on a vendor's lien (R. 657a). Hoffman, who had had no previous experience as a motion picture exhibitor, operated the National theatre for 14 weeks in 1943 (R. 657a). Petitioner Fifth and Walnut, Incorporated, was then organized for the sole purpose of leasing and operating the National theatre. Its paid-in capital stock was $5,000 (R. 480). The principals of that corporation were L. F. Gran and Charles E. Hogan, both of whom were also interested in Standard Riverside Company, a theatre circuit operating about 20 theatres (R. 460-471). Three days after its organization the stock of Fifth and Walnut was transferred to Standard Riverside, and that company operated the National theatre until December, 1945, when Schwartz, the promoter, and Janecky, the theatre manager, came into the picture, each investing $5,000 (R. 413a).

The Schwartz-Janecky combination was not a happy one (Caskey Ex. AAA, R. 739). Meetings were held with Gran in Chicago which resulted in Janecky's elimination (R. 488a-489a). Janecky then entered the candy business, but retained

[3]Petitioners included 5 volumes of testimony, exhibits and other material as an appendix to their brief in the Court of Appeals. The pages to that appendix were numbered with a small "a." The respondents-appellees also printed two volumes of testimony and exhibits as an appendix to their briefs in the Court of Appeals. Those volumes constitute the Record. References to petitioners' portion of the record are designated with a small "a." References to respondents' portion of the record do not contain that designation.

a percentage of any recovery in this lawsuit as a part of his financial settlement with Schwartz (R. 337a, 489a). Hoffman had sold the National theatre prior to the trial, retaining, however, an interest in the lawsuit.

By the time the case below was reached for trial the anticipated proceeds of the lawsuit had been divided, percentage-wise, between Hoffman, Janecky, Schwartz, the lawyers and even Forer, an accountant, who testified for petitioners at the trial, was to receive compensation contingent, in part, upon the amount of recovery (R. 339a-340a, 811).

Gran, Hogan, and Standard Riverside, who owned petitioner Fifth and Walnut for two of the two and a half years involved in this case, assert no claim against any of the defendants. Neither Gran nor Hogan testified at the trial. Defendants, however, took their depositions and read them at the trial (R. 211, 525).

The Theatres Involved

The case below was imported to the Southern District of New York to avoid a trial before a Louisville court and jury. It was, therefore, necessary to give the court and jury a true picture of Louisville and the motion picture theatres in the downtown section.

A. The National Theatre

Petitioners' National theatre has had a long career of unsuccessful operation. Long before the date of the conspiracy alleged in the complaint the National was a failure. The theatre was built in 1912 by Detroit interests and was operated until 1928 by Keith's. Keith's abandoned the theatre in that year because it could not be operated successfully. Other operators

of the National included a Mr. Bass (R. 572), the Switow circuit (R. 184), Fourth Avenue Amusement Company (R. 985a), a Colonel Gray, who was associated with Sudekum of Crescent Amusement Company (R. 187), and a Mr. Reubens of the Great States circuit (R. 187). None could operate the National successfully. The theatre had several "fly-by-night" operators (R. 573-574).

So far as motion picture theatres in Louisville are concerned, the National is definitely "off location" (R. 1766a, 1852a, 1930a, 1992a, 172, 284, 573). It has long had a bad reputation (R. 1766a, 371). As the Court of Appeals said, there was evidence and testimony to indicate that "the troubles of plaintiffs' theatre were due more to its location, condition, and quality of patronage than to their [the defendants'] acts" (176 F. (2d) 587, 594). In denying plaintiffs' motion for a new trial, Judge Leibell summarized correctly the character of the National theatre, saying (R. 689-690):

> "Now then, you had this additional situation in respect to the National and that was its location and the fact that it had been an unsuccessful theatre and the fact that grade A pictures are sold on a percentage of the receipts. Now, the National hadn't been a success from the time that Keith gave it up in 1928. It had been closed for periods of time, it had been operated for various purposes, for stock shows, legitimate shows, so called, and for vaudeville, for tabloids I think—when I say 'tabloids' I mean those compressed or abbreviated editions of successful Broadway shows. Dolle went in there and he had all he could take in the way of losses in about a month or six weeks. There was another man who went in there—
>
> * * *
>
> "The man who had the Kentucky. That is right. He went in there and he lost money. Those men had

long term leases with the right of cancellation, and they canceled and they went out. Now the jury might very well have concluded that it certainly was the exercise of good business judgment for anyone who had a grade A picture not to put it in the National on a percentage basis if he could get it in one of these other theatres that seemed to have a more successful operation. Now, you had to face that too. These men were practical men, business men. Of course, I think cases of this kind anyway should be tried before a jury; it is a much better thing than trying it before the Judge because there are twelve minds there in the juryroom and they have all had different contacts and have had perhaps a more practical approach to problems than the Judge would have."

B. The Other Theatres

The Rialto and Strand theatres are operated by Fourth Avenue Amusement Company, a small independent theatre circuit operating ten theatres in Indiana and Kentucky. Fourth Avenue is not affiliated with any defendant in this case. The Rialto is a de luxe motion picture theatre, located on Fourth Street, between Chestnut and Broadway. It has approximately 3,200 seats and is owned by local interests. The Strand is located 110 feet east of Fourth Street on Chestnut. It was leased by Fourth Avenue in 1923. Fourth Avenue subsequently acquired the fee for $225,000 in preference to the National which was offered to it for $85,000 (R. 1995a). The Rialto and Strand generally exhibit pictures distributed by Paramount, RKO and Twentieth Century-Fox.

The Mary Anderson theatre, located next door to the Rialto, is operated by the independent People's Theatre Company. People's Theatre Company is not affiliated with any defendant in this case. The Mary Anderson is a smaller theatre, having

approximately 1,000 seats, but is exceptionally well located. It is a well operated theatre and has been maintained in a modern condition. It exhibits Warner Bros. pictures almost exclusively and is known as the "home of Warner Bros. pictures".

Loew's-United Artists theatre is operated by Louisville Operating Co., Inc. It is located on Fourth Street, diagonally across from the Rialto. It has approximately 3,300 seats and is modern in every respect. Petitioners' principal witness, Janecky, conceded that Loew's-United Artists was the best theatre in Louisville (R. 508a). The theatre cost over $1,250,000 to build and an additional $250,000 was spent for equipment (R. 428). It is one of the finest theatres in the United States. It generally exhibits pictures distributed by Loew's, Columbia and United Artists.

The Brown theatre is operated by Broadway & Fourth Avenue Realty Company. It is located in the Brown Office Building, next door to the Brown Hotel, Louisville's finest, a short distance east of Fourth on Broadway. The theatre was built in 1925 by J. Graham Brown as a legitimate theatre (R. 1990a). The Brown was subsequently converted to a motion picture theatre and operated as such until some time in the thirties when it was closed (R. 286). In September, 1936, it was reopened as a move-over first run theatre (Ptffs.' Ex. 87, R. 2252a). The Brown has approximately 1,500 seats and is a first class theatre in every respect.

The Rialto, Loew's-United Artists and Mary Anderson theatres are situated in the "100 per cent" location for theatres (R. 282). The Strand and Brown are each less than one-half block away.

The Defendants

The defendants below, except United Artists Theatre Circuit, Inc., are engaged in one or more phases of the motion picture industry. The defendant Republic Pictures Corporation was dismissed at the close of the plaintiffs' case and Universal Pictures Company, Inc., was dismissed prior to the trial. The other defendants and their activities in Louisville are described briefly below.

United Artists Theatre Circuit, Inc., is a Maryland corporation, engaged in the business of holding securities in other corporations. It does not operate or manage any theatres. It is not a producer, distributor or exhibitor of motion pictures. It is, in effect, an investment trust (R. 1681a, 1682a). During the period of this lawsuit, United Artists Theatre Circuit, Inc., owned 50 per cent of the stock of Penn-Federal Enterprises, Inc., which, in turn, owned all the stock of Louisville Operating Co., Inc., operator of Loew's-United Artists theatre in Louisville (R. 830a). United Artists Theatre Circuit, Inc., has no other connection with Louisville. It did not participate in the management or operation of Loew's-United Artists theatre (R. 1682a).

Loew's Incorporated is a producer and distributor of motion pictures and has an interest in a limited number of theatres. It owns the other 50 per cent of the stock of Penn-Federal Enterprises, Inc. Marcus Loew Booking Agency, Inc., is a wholly owned subsidiary of Loew's Incorporated. Marcus Loew Booking Agency, Inc., acted as the buyer and booker for Louisville Operating Co., Inc., and rendered other services of an accounting nature for all of which it received as compensation the sum of $100 per week (R. 372, 373). Neither Loew's Incorporated nor Marcus Loew Booking Agency, Inc., nor Louisville Operating Co., Inc., participated in the operation of the Brown

theatre or in any other theatre in Louisville except Loew's-United Artists theatre. Loew's pictures were exhibited in Loew's-United Artists theatre.

Columbia Pictures Corporation is a producer and distributor of motion pictures. It has never had any interest in any theatre. Columbia licensed its pictures, approximately fifty in number, on a yearly or seasonal basis (R. 1426a-1427a). Five or six of Columbia's pictures may be classified as "A" or "top" pictures, the remainder being westerns or program pictures suitable only as the second or lesser feature on a double-feature bill (R. 1426a-1427a, 554a-555a). Columbia licensed its pictures to the Brown theatre until 1934 when that theatre closed (R. 1421a). In that year it was able to license its pictures to Loew's-United Artists theatre. Columbia has had profitable and satisfactory business relations with Loew's-United Artists theatre, receiving substantial returns from its pictures and adequate exploitation (R. 1421a, 1429a, 544, 547-548; see Frohlich Ex. F, R. 805). Columbia licensed seven pictures to the National theatre (R. 281a-283a). The National rejected ten Columbia pictures in a single year (R. 560a).

United Artists Corporation is a distributor of motion pictures for independent producers. Each producer's pictures are licensed separately and apart from other producers' pictures (R. 360, 430). Each producer reserves the right to control and determine the sales and marketing policy of its own pictures (R. 431-432). Pictures distributed by United Artists have been licensed to Loew's-United Artists theatre for many years.

Warner Bros. Pictures Distributing Corporation is a distributor of Warner Bros. pictures. Neither it nor any company affiliated with it has an interest in any theatre in Louisville. Prior to 1933, Warner Bros. licensed its pictures to the Rialto and other theatres for first run exhibition. Because of busines

disputes and general dissatisfaction with its first run returns from those theatres, Warner Bros. in 1933 began licensing its pictures for first run to the independent People's Theatre Company for exhibition in the Mary Anderson theatre and has continued to do so (R. 1000a). Warner Bros. has had satisfactory business relations with the Mary Anderson, receiving substantial returns on its pictures and the fullest exploitation of them (Freedman Ex. C, R. 773). The Mary Anderson is known as "the home of Warner Bros. pictures".

——Twentieth Century-Fox Film Corporation is a producer and distributor of motion pictures. It has no interest in any theatre in Louisville. Twentieth Century-Fox has been licensing pictures to Fourth Avenue Amusement Company since the latter was organized in 1914. At that time Twentieth Century-Fox licensed Fourth Avenue's old Alamo theatre which was being operated in opposition to the Keith circuit. In fact, both companies entered the motion picture business at about the same time (R. 1948a, 562).

Paramount Pictures Inc. is a producer and distributor of motion pictures. It has no interest in any theatre in Louisville. It had been licensing its pictures to the Rialto for many years when Fourth Avenue leased the theatre in 1931. It continued to do so. Paramount has had a long and successful business experience with the independent Fourth Avenue Amusement Company, operator of the Rialto and Strand theatres. Every picture distributed by Paramount during the period of the lawsuit had a first run at the Rialto or Strand (R. 1882a).

RKO Radio Pictures, Inc., is a producer and distributor of motion pictures. RKO has no interest in any theatre in Louisville. It had licensed its pictures to the Brown theatre for some time prior to that theatre's closing in the thirties. RKO then searched for the best outlet for its pictures in Louisville. In the

exercise of its best independent business judgment it selected the Rialto and Strand theatres for the exhibition of its pictures on first run in preference to the Mary Anderson or Loew's United Artists theatre. The National was not operating at that time. RKO's business relations with Fourth Avenue have been satisfactory.

ARGUMENT

FIRST: THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S REFUSAL TO ADMIT PORTIONS OF THE RECORD IN *UNITED STATES* v. *PARAMOUNT*.

The Trial Court Properly Refused to Admit Those Portions of the Record in *United States* v. *Paramount* Offered by Petitioners. Petitioners Did *Not* Offer the Decree of December 31, 1946. There Was No Final Decree on June 25, 1948, Which Petitioners Could Have Offered.

In denying petitioners' offer of the material described above, the trial court said (R. 2100a-2101a):

> "We have therefore this situation: that there was a final decree in this case, the one of December 31, 1946, and it has been reversed. That much is clear. So it is no longer the final decree. And that being so, I don't see how, under Section 16 of the antitrust laws, you have the right to offer any part of that record as prima facie evidence of anything in this action."

It is perfectly clear that there was no final decree in *United States* v. *Paramount*, on June 25, 1948, when petitioners made their offer.[4]

The only authority for the admission in a private right action of a "final judgment" entered in a criminal prosecution or a "final decree" in a civil action by the United States is Section 5 of the Clayton Act. There is no other authority. The words of that statute are unambiguous. The Clayton Act does not provide for reception of a "final or interlocutory judgment or decree" or for a "partially final judgment or decree" or for a "partially final judgment or decree and findings of fact and conclusions of law". The provision is "final judgment or decree".

In affirming the ruling of the trial court, the Court of Appeals said (176 F. (2d) 587, 592-593):

> "There is of course no question that the cases have not even yet reached their final termination. Upon

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[4]*United States* v. *Paramount* was begun on July 20, 1938, by the filing of a petition. A Consent Decree was entered on November 20, 1940, as to five of the defendants. A trial was held in the fall of 1945 before a three-judge District Court, convened pursuant to the Act of February 11, 1903, 32 Stat. 823, as amended. The District Court filed its opinion on June 11, 1946, and its Findings of Fact and Conclusions of Law and a Decree on December 31, 1946. The plaintiff and the defendants appealed. This Court rendered its decision on May 3, 1948, affirming in part and reversing in part the decree of the District Court. On June 25, 1948, the surviving members of the District Court entered an order which provided that the Mandate of the Supreme Court should be made the order of the District Court and that a trial should be had in conformity with the opinion of the Supreme Court. This was the status of the case on June 25, 1948, when petitioners made their offer in the case at bar. Before any testimony was taken on the remand, RKO Radio Pictures, Inc., entered into a Consent Decree with the plaintiff. Paramount Pictures Inc. entered into a Consent Decree on March 3, 1949. Paramount and RKO are no longer parties to the action. Thereafter, on July 25, 1949, the District Court filed its opinion on the remand from this Court. The District Court is now considering the new Decree, Findings and Conclusions which will be entered. Argument on those matters is set for December 6, 1949.

remand, certain of the defendants entered into consent decrees with the government; as to the others, lengthy hearings and deliberations are being had. The strongest position of the plaintiffs is that the Supreme Court has accepted the basic findings of illegality and has sent the cases back for more complete relief; in short that the error found was of the nature to make the final result more favorable than otherwise to the plaintiffs' position. Several questions are suggested by the issue thus framed, such as whether the material is in reality relevant to the local controversy here presented (*i.e.*, whether the estoppel between the parties which determines the prima facie character of the evidence has a legal bearing on the Louisville situation) or, if any of the proceedings are admissible, how much and what portion of them are to be set before the jury. We do not consider these, however, since upon as careful consideration as we can make we find ourselves in agreement with the trial judge that the government suit has not reached the stage where it can properly be considered within the statutory terms. We think this answer is indicated upon both legal and practical grounds."

The decision of the Court of Appeals is in accord with all cases which have considered this question. See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn., 1939); *Duluth Theatre Corporation* v. *Paramount Pictures*, 72 F. Supp. 625 (D. Minn., 1947); *Dickinson* v. *Twentieth Century-Fox Film Corp.*, D. C. W. D. Mo., No. 4728, March 7, 1949; *Barnsdall Refining Corporation* v. *Birnamwood Oil Co.*, 32 F. Supp. 308 (E. D. Wis., 1940); *Brunswick-Balke-Collender Co.* v. *American B. & B. Corp.*, 150 F. (2d) 69 (C. C. A. 2nd, 1945), *cert. den.*, 326 U. S. 757; and *Proper* v. *John Bene & Sons*, 295 Fed. 729 (E. D. N. Y., 1923).

The estoppel contemplated by Section 5 of the Clayton Act relates only to facts which were necessarily found in the prior government litigation *and* which are in issue in the private suit. It is in the nature of collateral estoppel. *Commissioner* v. *Sunnen*, 333 U. S. 591; *Cromwell* v. *County of Sac*, 94 U. S. 351; *The Evergreens* v. *Nunan*, 141 F. (2d) 927 (C. C. A. 2nd, 1944), *cert. den.*, 323 U. S. 720; SCOTT, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942); and RESTATEMENT, JUDGMENTS, § 68, *et seq.* (1947 amendment).

There is no estoppel as to legal principles, although plaintiffs below, in the trial court's entire charge, had the full benefit of the law as found by the statutory court and the Supreme Court in *United States* v. *Paramount*. There was, in fact, no legal principle announced by either Court which was not exhaustively covered by the trial court in its charge to the jury. See *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 295 Fed. 98 (C. C. A. 5th, 1923); *Charles A. Ramsay Co.* v. *Assoc. B. P. of the U. S. & C.*, 271 Fed. 140 (C. C. A. 2nd, 1921); *Sullivan* v. *Associated B. & D. of United States*, 272 Fed. 323 (S. D. N. Y., 1919); and RESTATEMENT, JUDGMENTS § 70 (1942).

The following statement by Judge Clark, speaking for the Court of Appeals in this case, is particularly pertinent (176 F. (2d) 587, 594):

> "The practicalities of the situation also point the same way. The problem will of course appear in acute form only in jury cases. In non-jury cases—and even in jury cases so far as the law is concerned—the decisions of the Supreme Court, whether or not affirming final judgments, will be controlling precedents, even though practically it may not be easy to separate law and fact. At any rate, sophisticated lawyers and judges

will understand what the status of the government case is. But it will certainly not be easy to explain that (as in all fairness would be necessary, were the evidence to be admitted) to a jury of laymen. Thus, it may be substantially true that the government was more successful than its opponents in the appeal to the Supreme Court, and yet the question of how much and to what extent still remains. For example, the Supreme Court struck out the District Court's requirement that films be licensed on a competitive bidding basis, although it said, 'The competitive bidding system was perhaps the central arch of the decree designed by the District Court.' 334 U. S. at page 166. And since the elimination of this feature might affect the cases in ways other than those expressly mentioned, it declined to limit the freedom of the District Court on remand to reconsider the adequacy of the decree to only those parts it had specifically indicated. Under the circumstances the wisdom of limiting admissibility to a final and definitely settled decree seems clear."

It should be noted, parenthetically, that the Court of Appeals which affirmed the judgment below was composed of Circuit Judges A. N. Hand, Clark and Chase. Circuit Judge Hand was also a member of the Expediting Court which entered the decree and made the Findings of Fact and Conclusions of Law in *United States* v. *Paramount*. Neither Judge Hand, who wrote the District Court's opinion in the *Paramount* case, nor the Department of Justice considers that there was on June 25, 1948, or is now a final decree in *United States* v. *Paramount*. In its first proposal to the District Court on remand from this Court, the Department of Justice proposed 47 changes in the Findings of Fact, 4 changes in the Conclusions of Law and extensive modifications in the Decree. On July 25, 1949, the Expediting Court handed down its

opinion in *United States* v. *Paramount* after remand, Circuit Judge A. N. Hand again writing the opinion. Speaking for the Court, Judge Hand concluded:

> "We have specified former findings which should be vacated and in some instances have set forth proper substitutes. Further disposition of any findings to be made should await submission by the parties.
>
> "Submit proposed amended decree and findings on or before September 20, 1949."

The Department of Justice has now submitted its proposed Findings of Fact, Conclusions of Law and Decree. Sixty new Findings and 12 new Conclusions and a new Decree have been proposed. Among the new proposed Findings and Conclusions are replacements, amendments and modifications of those offered by petitioners.

The Findings of Fact and Conclusions of Law offered by petitioners did not relate to any matter litigated in this case and were irrelevant and immaterial. The Clayton Act did not affect the usual rules as to relevancy, materiality and probative value. Moreover, petitioners were offered every opportunity by the trial court to offer evidence relating to every phase of the defendants' conduct in Louisville. A consideration of the material offered is conclusive on that point.

Findings 2, 12, 13, 14, 24, 38, 40, 44, 50, 53 and 56 relate only to the corporate structure of the defendants, all of which facts were admitted in the defendants' answers. Findings 62, 63, 64, 67, 69, 70, 71, 72 and 73 and Conclusions 7(a), 7(b), 8(a) and 8(b) relate to provisions in contracts between the distributors and their licensees fixing minimum admission prices. Petitioners' principal witness, Janecky, testified that he fixed his own prices and that he claimed no injury as a result of the prices fixed in his contracts (350a-351a). Janecky also testified that the National charged a higher ad-

mission price than the other theatres (349a, 351a). There is absolutely no issue of price-fixing in this case. There never was. Findings 79, 81, 82, 83 and 84 and Conclusions 8(c) and 8(e) relate to runs and clearances. Those findings and conclusions were too broad and general to be read to the jury in any event. They do not relate to Louisville. The trial court, however, admitted extensive evidence concerning the so-called exclusive second run at the Kentucky, the third run at the Uptown and the theatre situation in Louisville generally. And the trial court charged the jury, as requested by petitioners, in the exact language of *United States* v. *Paramount* as to the effect of such a conspiracy in Louisville.

Finding 110 and Conclusion 8(d) relate to discriminations against small independent exhibitors in favor of large affiliated and unaffiliated circuits. That situation was not present in this case. Only one of the discriminatory practices referred to in Finding 110 could possibly have any relevancy in this case; and, as to that (move-over), the court correctly charged the jury (R. 2162a, 2168a-2169a). The Court of Appeals approved the charge given. Moreover, the District Court in *United States* v. *Paramount*, in its opinion on remand (dated July 25, 1949), said:

> "The plaintiff requests cancellation of paragraphs 8 and 9 in Section II of our former decree, which include provisions as to discrimination, and wishes to substitute a flat prohibition against including in licenses made with affiliated exhibitors or circuits of theatres certain contract provisions by which discriminations against small independents and in favor of the large affiliated and unaffiliated circuits were accomplished, as this court stated in Finding 110, affirmed by the Supreme Court. *These provisions would only be illegal if inherently discriminatory or used in a discriminatory manner.*" (Italics supplied.)

Findings 113 and 116 and Conclusions 9(a) and 9(b) relate to pools. Petitioners specifically disclaimed that their Exhibit 87, relating to the Brown theatre, constituted a pool (R. 1241a, 1310a, 1330a, 1410a, 1473a). On remand, the District Court in *United States* v. *Paramount* vacated, among many others, Finding 116 (Opinion, dated July 25, 1949).

The purpose of Section 5 of the Clayton Act is merely to establish *prima facie* evidence. It is clear from the record in this case, however, that there was no necessity for the introduction even of a final decree, if there had been one, because the petitioners were permitted to, and did, introduce all the evidence they desired relating to Louisville and the alleged conspiracy among the defendants in that city. They were granted the utmost latitude. Indeed, Exhibits 87 and 87-A, upon which petitioners rely, were read to the jury (R. 906a, 908a). The jury had the benefit of all necessary evidence relating to the controverted issues in this case. None of the evidence introduced was before the court in *United States* v. *Paramount*.

SECOND: THERE WAS NO ERROR IN THE CHARGE AND THE REFUSAL TO CHARGE RELATING TO THE BROWN THEATRE.[5]

Petitioners argue to this Court for the first time[6] that "if joint operation of a theatre by two or more competing exhibitors

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[5]Because the defendant Warner Bros. licensed no pictures to the Brown theatre, petitioners assert no error and make no claim against Warner Bros. on this issue.

[6]So far as the Brown theatre is concerned, the only exceptions made to the trial court and the only error urged to the Court of Appeals was that the trial court erred in refusing six requests to charge and in making one charge relating to the Brown theatre. Petitioners did not specify as error to the Court of Appeals the trial court's refusal to direct a verdict. To the contrary, they specifically disclaimed that as error, saying, "It is not here urged, however, that error was committed in denying appellants the directed verdict they requested at the conclusion of the evidence" (Pet. brief in the Court of Appeals, p. 41). In this connection, see *Duignan* v. *United States*, 274 U. S. 195, 200, and *Husty* v. *United States*, 282 U. S. 694, 701.

is illegal *per se*, then petitioners were entitled to a directed verdict" (Pet. brief, p. 53). Petitioners assert that their "requests to charge were predicated on the theory that petitioners were entitled to a directed verdict because of the clear and demonstrated proof that the agreement for the operation of the Brown Theatre by competing Louisville exhibitors as a move-over theatre was illegal *per se*" (Pet. brief, p. 13). Petitioners have mistaken their own theory below and in the Court of Appeals. The latter correctly said (176 F. (2d) 587, 589, 590):

> "This appeal by plaintiffs from a defendants' verdict and judgment in a private action for damages and injunctive relief under the antitrust acts, 15 U. S. C. A. §§1, 2, 15, 26, comes to us on quite narrow issues of law. Plaintiffs claim two grounds for reversal: (1) the court's refusal of certain requests to charge, and certain language in the charge itself; * * *
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> * * * * * *
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> "It is of the essence of plaintiffs' argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the court. It was not the move-over arrangement itself that was condemned in United States v. Paramount Pictures, Inc., 334 U. S. 131, but rather the discriminatory fashion in which move-over privileges were accorded by distributors to 'large affiliated and unaffiliated circuits' and not to 'small independent exhibitors.' Plaintiffs make no claim here that they were denied the opportunity to move what first-run pictures they did receive over to the Brown."

Petitioners' argument is based upon their misapprehension of the holding of the District Court and of this Court in *United States* v. *Paramount*. In rejecting petitioners' theory, which was not, however, urged as error, the Court of Appeals properly assessed the holding of this Court and of the District Court relating to "pools." The District Court in *United States* v. *Paramount* held that the defendants had combined and conspired in restraint of trade so far as several enumerated trade practices were concerned. Among the practices condemned because of the combination and conspiracy were price-fixing, a system of runs and clearances, formula deals, master agreements and franchises, block-booking and blind-selling and "pooling" agreements. It is this last practice, found to have been part of the conspiracy by the District Court and affirmed by this Court, which petitioners rely upon in asserting that joint operation of a theatre by two or more competing exhibitors is illegal *per se*. Petitioners' argument, while wholly fallacious, requires a brief consideration of the facts surrounding the Brown move-over.

In 1936, seven years before plaintiffs came to Louisville, the Brown theatre was closed. It was depressed property under the general management of a Louisville bank which held the mortgage. Through the bank's efforts, an agreement was made (Ptffs.' Ex. 87, R. 2252a) between the operators of the Rialto and Strand, Brown and Loew's-United Artists theatres, to reopen the Brown as a move-over first run theatre. *No defendant in this case was a party to that agreement.* The agreement enabled the Brown to reopen in 1936, thereby stimulating competition and benefiting not only the operator of the theatre, but the motion picture public as well. There was no pool, as that term was used by the District Court and by this Court in the

Paramount case.[7] Moreover, plaintiffs at least five times expressly stated that the Brown theatre was *not* "pooled" with the Rialto, Strand and Loew's-United Artists theatres (R. 1241a, 1310a, 1330a, 1410a, 1473a). Nor was there any joint operation or joint ownership of the Brown theatre. Broadway & Fourth Avenue Realty Company continued to operate the Brown theatre. Mr. Dolle of Fourth Avenue Amusement Company booked and bought pictures for the Brown but did not otherwise participate in the management or operation of the theatre. Neither Loew's Incorporated, nor Marcus Loew Booking Agency, Inc., nor Louisville Operating Co., Inc., participated in the operation or management of the Brown, nor did Fourth Avenue or Broadway & Fourth Avenue participate in the operation of Loew's-United Artists theatre. The Court of Appeals said (176 F. (2d) 590):

> "Likewise, the joint operation of the Brown Theatre by one independent exhibitor and a subsidiary of one of the defendants (Loew's) was a type of activity which would not be unlawful unless a conspiracy to monopolize or restrain commerce by means of that activity was found by the jury to exist as to some of the defendants in the present action. The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. *It was made in a suit between the United States and various distributors and exhibitors*

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[7]Neither Loew's Incorporated, nor Marcus Loew Booking Agency, Inc., nor Louisville Operating Co., Inc., had any interest in the Rialto and Strand. Nor did Fourth Avenue Amusement Company have any interest in Loew's-United Artists theatre. There was no pool, because there was no sharing of the profits of two or more competing theatres. To have been a pool, the operator of the Brown theatre must have had an interest in the profits of the Rialto, Strand and Loew's-United Artists theatres. It had none. The most that could be said is that Loew's Incorporated indirectly received one-half of one-third of the profits of the Brown theatre.

> *on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed.* Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Antitrust Act; and no such decision has ever been made." (Italics supplied.)

In its charge to the jury, the trial court gave petitioners the benefit of every possible inference of conspiracy to be drawn from the Brown move-over agreement. The specific charge excepted to (p. 2, *supra*) was a clear and concise statement of the applicable law. Petitioners have cited no case in this Court or in any other court which is contrary to it. The Court of Appeals expressly approved the charge excepted to, saying (176 F. (2d) 587, 591):

> "Plaintiffs' objection to this portion of the charge is based on the notion that by participating in the move-over arrangement, to which only one of the defendants was a formal party, the distributor defendants all joined in a conspiracy in restraint of competition. But unless the move-over arrangement was intended, by itself or as part of a more inclusive plan, to keep plaintiffs out of the business of exhibiting first-run motion pictures, it was not in itself illegal and any or all the defendants were entitled to participate in it. This is not to say that the jury could not have found, particularly against the background of the motion picture industry as it is now known, that the move-over arrangement was part of such a conspiracy. *But the jury did not so find, and the alternative which they chose was properly offered to them in the court's charge.*" (Italics supplied.)

Petitioners' six requests to charge which were denied by the trial court were correctly evaluated by the Court of Appeals as

"unclear", "erroneous" or "superfluous in the light of the charge actually given" (176 F. (2d) 587, 591-92). All six were inherent with the vice characterized by Judge Clark as "seeming to foreclose jury consideration, and to direct the verdict, as to the most important and decisive issue in the case" (176 F. (2d) 587, 592). That issue was whether the defendants had combined and conspired to license only certain theatres first run and not to license petitioners' National theatre first run. The trial court properly submitted that question to the jury.

The extraordinary prominence petitioners place upon the Brown move-over demonstrates the fatal weaknesses of their cause. Competition was not lessened as a result of the Brown move-over agreement. There was no restriction against the public in that or in any other phase of the defendants' alleged activities. It is undisputed that every picture distributed by the defendant distributors had a first run in Louisville. The public interest was in no way involved. This case is concerned solely with the alleged damage caused to the petitioners by the defendants' alleged conspiracy. Petitioners complained of a conspiracy among the defendants to license their pictures only to certain theatres, and not to license petitioners' National theatre. The case was tried on that complaint. The jury was given the most favorable charge petitioners could have desired concerning the defendants' activities and their alleged conspiratorial activity. The question of conspiracy was solely for the jury. On that question, the jury found against the plaintiffs and for the defendants.

CONCLUSION

A writ of certiorari should not issue to the Court of Appeals for the Second Circuit.

Petitioners have advanced no valid reason why a writ of certiorari should issue to the Court of Appeals for the Second

Circuit. In affirming by a unanimous decision the judgment below, the Court of Appeals stated that:

1. Petitioners had a fair trial;

2. While petitioners offered evidence justifying inferences of joint action among the defendants, the verdict was nevertheless quite within the evidence and defendants, on the other hand, offered vigorous controverting evidence as well as testimony to indicate that the troubles of petitioners' theatre were due more to its location, condition, and quality of patronage than to their acts;

3. Petitioners chose a distant tribunal where jurors would be as little influenced by matters of local prejudice as would be possible anywhere; and

4. Having so chosen and received a full and proper trial, petitioners must abide by the result.

There is nothing in the decision of the Court of Appeals for the Second Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised by the petitioners which has not been, but should be, settled by this Court.

Respectfully submitted,

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November 12, 1949.

APPENDIX

ACT OF JULY 2, 1890, 26 STAT. 209:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

ACT OF OCTOBER 15, 1914, 38 STAT. 730:

"Sec. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."